IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 4 OF 2006

Mr. Vishnu Bhat,
flat no.3, Patkar Building,
near Police Station, Curchorem Goa. .... Appellant

V/s

1. Narayan R. Bandekar,
Managing Director,
M/s. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd.,
Nitin Chambers,
Vasco da Gama, Goa.

2. M/s. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd.,
Nitin Chambers,
Vasco da Gama, Goa.

3. M/s. Anant V. Sarmalkar,
Nitin Chambers,
Swatantra Path, Vasco da Gama, Goa. .... Respondents

Mr. S.G. Bhobe, Advocate for the Appellant.

Mr. A.F. Diniz, Advocate for Respondents.

CORAM : N.A. BRITTO, J.

DATE : 25th OCTOBER, 2007

ORAL JUDGMENT:

This is a Complainant's appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, by judgment dated 26/08/2005 of the learned JMFC, Vasco-da-Gama.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the complaint.

3. The Complainant was an employee of accused nos. 2 and 3 whose services were terminated with effect from 16/06/1991. The accused no. 1 (hereinafter referred to as the accused) was the Managing Director of accused no. 2, a company, and partner of A3, a firm. Although, three accused were prosecuted in the said complaint case and all were acquitted, by order of this Court dated 19/01/2006 leave to appeal was granted only against the accused-Narayan R. Bandekar, as the the subject cheque of Rs. 30,000/- was issued by him in his personal capacity towards the liability which respondents No. 2 and 3 owed to the Complainant.

4. The termination of the services of the Complainant resulted in proceedings being filed before the Industrial Tribunal and they ended in an award dated 24/09/2001 which was the result of settlement arrived at between the parties on 6/09/2001. As per the said settlement/award the first instalment of Rs. 10,000/- was to be paid to the Complainant on 17/08/2001, the second instalment of Rs. 20,000/- was to be paid on 7/09/2001, the third instalment of Rs. 30,000/- was to be paid on or before 30/10/2001 and the final instalment of Rs. 31,600/- was to be paid on or before 30/11/2001.

5. The complaint was filed on 29/01/2002. As per the Complainant, the said settlement before the Industrial Tribunal on behalf of the accused nos. 2 and 3 was signed by the accused who was the Managing Director of accused no. 2/company and accused no.3/firm. It was the case of the Complainant that towards the payment of the third instalment of Rs. 30,000/- the accused gave to the Complainant cheque dated 15/11/2001 for Rs. 30,000/- issued on Development Credit Bank, Vasco-da-Gama, Goa. As per the Complainant, the said cheque was drawn by the accused for and on behalf of the accused nos. 2 and 3.

6. The Complainant presented the said cheque for payment, first on 27/11/2001 to the drawee bank, and it was returned with remark, "refer to drawer" whereupon the Complainant again presented the said cheque on 12/12/2001 but this time the drawee bank returned the same dishonoured for insufficient funds in the account of the accused who was the drawer of the said cheque.

7. The Complainant sent the notice dated 17/12/2001 by registered post A/D to the accused and demanded the payment of the amount mentioned in the said cheque within 15 days of the receipt of the notice and according to the Complainant, the accused refused to accept the said notice and therefore according to the Complainant it was good service. As per the Complainant,

the said notice was issued to the accused as the said cheque was drawn by him. The Complainant stated that the said accused was also the Managing Director of A2/Company and partner of A3/firm and hence it was a deemed notice to accused nos. 2 and 3.

8. The Complainant stated that the said cheque was issued by the accused towards the discharge of their liability to the Complainant. However, the bankers of the accused dishonoured the cheque as the funds were insufficient in the account of the accused and the accused failed to make the payment within 15 days despite receiving the said notice, demanding the payment of the said dishonoured cheque.

9. In support of his case, the Complainant had examined himself and the Managers of his bank where the cheque was deposited as well as the bank of the accused. The accused did not lead any evidence but it was the case of the accused that he had given instructions to withhold the payment. The accused also stated that he had stood as a surety.

10. After filing of the complaint on 29/01/2002, the case was fixed for settlement from time to time and the Complainant was paid Rs. 45,000/- on 13/11/2002. Further amounts of Rs.7,000/- and Rs. 8,000/- were paid on 23/12/2002 and 27/01/2003, respectively. The substance of accusation was

framed on 23/07/2003, and, in the course of his evidence the complainant admitted that he had received Rs. 30,000/- from his employer i.e. accused no.2, after filing the complaint and he had also received a further amount of Rs. 60,000/- from the accused. The Complainant also admitted that he had received the entire amount due of Rs. 91,600/- under the said award.

11. The learned Magistrate came to the conclusion that the Complainant had filed the present complaint against the accused in the capacity of Managing Director of accused no.2. The learned Magistrate also came to the conclusion that after filing the complaint, the Complainant received first Rs. 30,000/- and then Rs. 60,000/- and being so, the learned Magistrate observed that she failed to understand on what basis the Complainant had filed the complaint and further came to the conclusion that the Complainant had the intention of grabbing extra amount for which the Complainant was not entitled to. In case the accused no.2 had paid to the Complainant Rs. 45,000/- as on 13/11/2002 and thereby the amount due on the subject cheque of Rs. 30,000/- one fails to understand as to why the learned Magistrate proceeded to explain a substance of accusation to the accused on 23/07/2003 in case subsequent payment had the effect of wiping out the offence committed by the accused. As regards the notice, the learned Magistrate came to the conclusion that there was no provision in the Act to send notice to one accused which would comply with the requirement of sending notice

to all the accused, in one envelope and since the notice was sent in one envelope to all the three accused, jointly addressed to them, the complaint was not maintainable.

12. Learned Counsel on behalf of the accused, contends that the view held by the learned trial Court on both the counts is possible and plausible view and therefore this Court ought not to interfere with the same. Learned Counsel has placed reliance on ***State V/s Jeronio Fernandes & Ors. (2006 (1) Bom. C.R. (Cri.) 109)*** and ***Lakhpatraj Samparaj Jain V/s State of Maharashtra & Ors. (2007 (1) Bom. C.R. (Cri.) 499)***. In the first case it has been held that while exercising its jurisdiction under Section 378 Cri.P.C. the High Court should not substitute its own view for the view taken by the trial Court and in case two views are possible, then ordinarily the view taken by the trial Court should not be disturbed. In the second case it was held that non-service of notice was certainly a possible view which could have been taken on the basis of material on record. On those facts this Court had refused to grant to leave to appeal.

13. As far as the appellate powers of this Court are concerned, the law is well settled. The appellate powers of this Court against an order of acquittal are no different from the powers against an order of conviction. This Court has full powers to review at large the evidence upon which the order of

acquittal is founded and to reach the conclusion that upon that evidence, the order of acquittal should be reversed. It should only bear in mind the initial presumption of innocence is fortified by the acquittal and not weakened and if two conclusions are possible based on the evidence produced, then the Court will decline to interfere but in case the view taken by the trial Court is unreasonable or the judgment is manifestly erroneous then it is the bounden duty of this Court to set the acquittal aside. It is well to remember that the paramount consideration of the Court is to ensure that justice is done and miscarriage of justice is prevented. Acquittal of the guilty and conviction of the innocent are both to be avoided. As observed by the Apex Court in **State of *Himachal Pradesh V/s Lekh Raj & Anr. (AIR 1999 SC 3916)***, the Courts are required to replace the traditional dogmatic hypertechnical approach by rational, realistic and genuine approach for administering justice in a criminal trial.

14. The conclusions arrived at by the learned trial Court on the basis of evidence produced are highly unreasonable and therefore are required to be disturbed.

15. Admittedly, the Complainant had received as on 13/11/2002 Rs. 45,000/- i.e. more amount than due on the subject cheque and yet the learned JMFC proceeded to frame substance of accusation on 23/07/2003. One

would wonder as to why the learned Magistrate proceeded to frame the substance of accusation against the accused in case by that date the payment due on the subject cheque was made to the Complainant. This aspect seems to have been completely lost sight of by the learned Magistrate who even made some uncharitable remarks against the Complainant that he had filed the complaint only with the intention of grabbing extra amount for which he was not entitled to. As held by this Court in ***William Rosario Fernandes V/s Cabral & Co. & Ors. (2007 (1) Bom. C.R. (Cri.) 141)*** the offence under Section 138 of the Act is completed in all respects upon the failure by the accused to comply with the notice of demand. If payment is made within the said period of notice, then no offence is committed but in case of failure, the offence is completed. Even if the payment is made on the 16th day the same is not sufficient to come out of the rigours of Section 138 of the Act. In Criminal law commission of offence is one thing and prosecution for it is quite another. Referring to ***Rajneesh Aggarwal V/s Amit J. Bhalla (2001 (5) Bom. C.R.(S.C.) 162):(AIR 2001 SC 518),*** it was stated that so far as the criminal complaint is concerned, once the offence is committed, any payment made subsequent thereof, will not absolve the accused of the liability of the criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. The Supreme Court in the aforesaid case has stated that the object of issuing notice indicating the factum of dishonour of cheques, is to give an opportunity to the drawer to

make payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the Bank dishonoured the cheques. Relying on the said decision this Court held that once the offence is committed, any payment made subsequent thereto, will not absolve the accused of the liability of criminal offence, though in the matter of awarding of sentence, it may have some effect on the Court trying the offence. It is therefore obvious that the accused could not have been acquitted under Section 138 of the Act only because the payments were made subsequently and therefore the acquittal of the accused has got to be considered as perverse and illegal in the light of the decision of the Apex Court, as followed by this Court in the said case of ***William Rosario Fernandes*** (supra).

16. Coming to the service of notice which is sine qua non for launching a prosecution under Section 138 of the Act, Counsel on behalf of the accused submits, that the said notice was sent to three different persons and when it was returned with postal endorsement as 'refused' it could not be attributed that it is the accused who had refused the same. Admittedly, a copy of the notice produced by the Complainant shows that the statutory notice dated 17/12/2001 was addressed to three different persons or entities, namely, the accused Mr. Narayan R. Bandekar, the Managing Director of M/s. Rajaram Bandekar (Sirigao) Mines Pvt. Ltd. and to the said Company/A2 and the firm/A3 but the Complainant had enclosed the said notices in one envelope

and the said returned envelope shows that it was addressed thus:

> Mr. Narayan R. Bandekar
> Managing Director,
> M/s. Rajaram Bandekar (Sirigao) Mines P. Ltd.
> M/s. Anant V. Sarmalkar
> Nitin Chamber, Swatantra Path,
> Vasco-da-Gama.

17. The said notice, as per the postal endorsement was returned as "refused, return to sender". The Complainant admitted that the said legal notice was enclosed in one envelope and was jointly addressed to all the accused and that he had not sent separate notices in separate envelopes. He denied the suggestion that the said notice was not issued in the name of the accused Narayan Bandekar in his personal capacity. The accused in his statement recorded under Section 313 of the Code denied that he had received the legal notice from the Complainant. In my view, the manner the Complainant had addressed the said notice, which address has been reproduced herein above, clearly shows that it was sent to the accused describing him as Managing Director of the said company and the said firm and when it was returned by the postman as refused, it is deemed to have been refused by the accused Narayan R. Bandekar and in such a situation I am not inclined to accept the submission of the learned Counsel on behalf of the accused, that the notice was sent to three persons and that no notice was served to the accused as required under Section 138 of the Act. The notice was duly served to the accused and in terms of Section 27 of the General

Clauses Act, there is a presumption that it was served, the presumption which could not be rebutted by the said accused by his mere denial in his statement under Section 313 of the Code. Refusal to accept has always been considered as good service.

18. Admittedly, the subject cheque was issued by the accused from his personal account and this has been admitted by the Complainant in his evidence. The Complainant has also admitted that he had received the said cheque from the accused in his personal capacity and had further stated in his cross-examination that he did not know why the accused had issued the subject cheque in his personal capacity and that he was aware that the accused was not owing any amount to him in his personal capacity. Nevertheless, the Complainant had stated in his affidavit in evidence that the subject cheque was issued for and on behalf of accused nos. 2 and 3. In this context learned Counsel on behalf of the accused, has placed reliance on an ex-parte judgment of this Court in the case of ***Hiten Sagar & Anr. V/s IMC Ltd. & Anr. (2001 (5) Bom. C.R. 890)*** wherein this Court observed that it is well settled principle of criminal law that a penal provision of a Statute has to be strictly construed and if in a wider connotation it will amount disadvantage to the accused, such wider connotation cannot be accepted. On a reading of Section 138 of the Act, it is clearly spelt out that a cheque must be drawn for discharge of the liability of the drawer of the cheque. In other

words, if he has drawn a cheque for the discharge of the liability of another person without creating any document, it will not and it would not come under Section 138 of the Act. This judgment of this Court came for consideration before this Court in an unreported judgment dated 31/08/2007 in ***Criminal Revision Application No. 6/2007*** in the case of ***Mr. Diago Fernandes V/s Mr. P.K. Vijayan & Anr.*** and in distinguishing the said judgment this Court observed thus:

> "Secondly, the said judgment has got to be considered as per incurrium in that it does not take into consideration the provisions of Section 139 of the Act as the aforesaid provision was not brought to its notice and it was also not in tune with the observations of the Apex Court in ***I.C.D.S. Ltd. V/s Beemna Shabeer & Anr. (2002 (4) ALL M.R. 270 (S.C.))*** wherein the Apex Court had stated that the legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes **other liability as well** (emphasis supplied)."

This court after taking into account some views expressed by other High Courts held as follows:

> "Section 138 of the Act deals with a cheque drawn by a person "for the discharge, in whole or in part, of **any debt or other liability**". The section does not say that the cheque should have been drawn for the discharge of any debt or other liability of the drawer towards the payee. If the intention of the Parliament was otherwise the words "of any debt or other liability" would have been further qualified by adding the words "of the drawer". Section 139 of the Act which creates a mandatory legal presumption again uses the words "for the discharge, in whole or in part, of any debt or other liability" which only means that the debt or other liability may be due from any person and it is not necessary that the debt or other liability should be due from the drawer alone. In other words, the expression "any debt or other liability" both in Section 138 as well as in Section 139 of the Act would include a cheque drawn by one person towards a legal enforceable debt or liability of another person."

19. When the Complainant stated that the accused had issued the subject cheque on behalf of accused nos. 2 and 3 all that the Complainant sought to convey was that the subject cheque was issued by the accused to meet the liabilities of accused nos. 2 and 3 who owed to the Complainant the said sums under the said award of the Industrial Tribunal and in such a case also the Complainant was entitled to the presumption available to the Complainant in terms of both Section 138 as well as Section 139 of the Act which are mandatory in nature and admit of no exception though the same can be rebutted by the accused either by giving evidence of his own or getting evidence in his favour from the Complainant, to displace the said presumption. The accused was nothing but an alter ego of the Company/A2 and the firm/A3 whose Managing Director/partner he was and had even paid a sum of Rs. 60,000/- to the Complainant, regarding which there was no denial. Therefore the contention that the accused had issued the cheque without consideration cannot be accepted. The Complainant had abundantly proved that the accused had issued the cheque to meet the liability of A2 and A3 whose Managing Director/partner he was.

20. Learned Counsel on behalf of the accused next refers to Section 43 of the Act and submits that there was no obligation created between the parties. Section 43 provides that the negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which

fails, creates no obligation of payment between the parties to the transaction. But if any such party had transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto. It is not necessary to refer to the exceptions to the said section. The Complainant in this case had stated that even settlement before the Industrial Tribunal was signed by the accused as Managing Director of accused nos 2 and 3 and thereafter had issued the subject cheque on behalf of accused nos. 2 and 3. In view of my finding that the cheque was issued by the accused to meet the liabilities of A2 and A3 under the award it is not necessary to dilate further on the provision of Section 43 of the Act, which is clearly inapplicable to the facts of the case.

21. The accused had also failed to prove that he stood as surety by issuing the said cheque. It was not just enough for the accused to have stated so but it was necessary to prove the same by preponderance of probabilities. Such a plea was not put forward to the Complainant and it was taken as an afterthought.

22. In the light of the above discussion, the accused could not have escaped his conviction under Section 138 of the Act. As a result, the appeal

deserves to succeed and the acquittal of the accused reversed. The accused is therefore hereby convicted under Section 138 of the Negotiable Instruments Act, 1881.

23. Admittedly, the Complainant received Rs. 45,000/- from A2 on 13/11/2002 and Rs. 60,000/- from the accused later. On behalf of the accused an application has been filed for compounding the offence under Section 138 of the Act which has now been made compoundable under Section 147 of the Act. Counsel appearing on behalf of the accused submits that the Complainant is not inclined to enter into any compromise with the accused. The said application dated 23/10/2007 filed on behalf of the Complainant today shall be placed on record and marked 'X' for identification. Lot of averments have been made in the said application stating that Complainant earlier had assured the accused to withdraw the complaint. The accused has also stated in the said application that he had then offered to the Complainant a sum of Rs. 15,000/- to put an end to the matter but the Complainant is out to extort more money from the said accused. It is not necessary to get into all that is stated in the said application filed by the accused today except to say that the Complainant is not willing to compound the offence and he cannot be forced to enter into a compromise. Learned Counsel on behalf of the accused has placed reliance on the judgment of this Court in the case of ***Tempo Instruments & Equipments***

(India) Pvt. Ltd. & Ors. V/s. Padmavati Jugal Kishore Mehta & Ors. (2007 (2) Bom. C.R. (Cri.) 626) and has submitted that compounding could be recorded by this Court irrespective of whether the Complainant is willing or not. As per learned Advocate the concept of compounding under Section 147 of the Act is different from Section 320 of the Code of Criminal Procedure, 1973. Counsel on behalf of the Complainant submits that no principle of law has been laid down in the said judgment of this Court relied upon on behalf of the accused and reported in ***Tempo Instruments & Equipments (India) Pvt. Ltd***.(supra) and I am inclined to accept the said submission. In that case, application for compounding which was opposed by the Complainant before the trial Court was granted by the learned Single Judge.

24. The expression "**Compounding**" in terms of Black's Law Dictionary means *to compromise; to effect a composition with a creditor; to obtain discharge from a debt by the payment of a smaller sum. To put together as elements, ingredients, or parts, to form a whole; to combine, to unite. To form or make up as a composite product by combining different elements, ingredients, or parts, as to combine a medicine*. The expression "**Compounding crime"** is also defined in the same dictionary and it states that *Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offence at*

common law, and under the typical compounding statute:

> *(1) the agreement not to prosecute;*
> *(2) knowledge of the actual commission of a crime; and*
> *(3) the receipt of some consideration.*

25. Compounding essentially involves a compromise or agreement and there cannot be a one way traffic whilst entering into a compromise and that would be both for the purpose of Section 147 of the Act as well as Section 320 of the Code. If the Complainant is not willing to accept a compromise, the same cannot be imposed upon him by the Court and the matter will have to be dealt with in accordance with law. Application filed by the accused, therefore needs to be rejected.

26. Learned Counsel on behalf of the accused has also brought to my notice the judgment of this Court in this case of said ***William Rosario Fernandes*** (supra) wherein fine of Rs. 5,000/- was imposed. He has also brought to my notice the judgment of the Apex Court in ***Narsingh Das Tapadia V/s Goverdhan Das Partani & Anr. (AIR 2000 SC 2946)*** wherein the Apex Court substituted the sentence by imposing a fine of Rs. 5,000/- to be deposited within two months. Learned Counsel on behalf of the Complainant has left the matter as regards fine to be imposed to the discretion of this Court.

27. Facts of every case cannot be similar. Though no formula of a fool-proof nature is possible to be laid down in awarding appropriate sentences they should be proportionate to the crime committed and the same should be awarded by taking into consideration the facts and circumstances of each case. It is not only the rights of the criminals which are required to be looked into at the time of imposition of sentence, but also of the victims of the crime and the society at large, also by considering the object sought to be achieved by the particular legislation. Sentence to be imposed should also have a deterrent effect. As George Saville would say 'men are not hanged for stealing horses but that horses may not be stolen.'

28. Here is a case where the complainant, an employee, has been fighting for his right against his employers' might for a very long time from 10/06/1991. The Complainant was then compelled to initiate criminal proceedings and being so the matter cannot be treated lightly. Since the payment due on the cheque was made subsequently the accused is hereby directed to pay compensation of Rs. 20,000/- to the Complainant and in default to undergo SI for 3 months.

29. The accused to deposit the said compensation before the trial Court within three weeks. In case the accused fails to deposit the said compensation, the learned Magistrate shall execute the sentence hereby

imposed.

N.A. BRITTO, J.

NH/-